In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1681

OTIS EDWARD GOLDEN,
Appellant,

vs.

THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the California Court of Appeal
Third Appellate District

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the California Court of Appeal for the Third Appellate District, entered on January 7, 1977, denying a Petition for a Writ of Habeas Corpus, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Opinion of the Court of Appeal for the Third Appellate District is reported in 65 C.A.3d 789, ...

C.R. ..... A Copy of the Opinion is attached hereto as Appendix "A".

JURISDICTION

A Petition for a Writ of Habeas Corpus was filed in the Superior Court for the County of Sacramento on April 2, 1976, and the judgment in denial of said petition was entered on June 3, 1976.

A Petition for a Writ of Habeas Corpus was then filed in the Court of Appeal, Third Appellate District, on June 16, 1976, and the judgment of said Court in denial thereof was entered on January 7, 1977. A Petition for Rehearing was filed in the Court of Appeal, Third Appellate District, on January 24, 1977, and the judgment in denial thereof was entered on January 27, 1977.

A Petition for Hearing was filed in the Supreme Court of California on February 16, 1977, and was denied on March 9, 1977. (19 C.3d 7).

The jurisdiction of the Supreme Court of the United States to review the decision of the Third District Court of Appeal is conferred by Title 28, United States Code, §1257(2). The following decision sustains the jurisdiction of the Supreme Court on direct appeal in this case:

Douglas v. California (1963) 372 U.S. 353, 354, footnote 1, 9 L.Ed. 2811.

QUESTION PRESENTED

Whether the absence in California Penal Code §1550.1 of a requirement, prior to extradition, of a judicial determination of probable cause to believe the fugitive has committed the crime alleged in the demanding state renders said statute violative of constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution.

STATUTES INVOLVED

Section 1549.1, 1549.2, 1549.3, 1550.1 of the California Penal Code, as amended, are set forth in Appendix "B" hereto.

STATEMENT

The appellant is a fugitive from the State of Washington and is incarcerated in the Sacramento County Jail. He is awaiting rendition to the State of Washington pursuant to an extradition warrant issued by the Governor of California on February 18, 1976. Said warrant was issued upon the following facts:

On September 30, 1974, Otis Edward Golden was charged in the State of Washington with the crime of forcible rape. Mr. Golden was tried on said charge on October 15, 1974, the trial resulting in a hung jury. On December 16, 1974, a substitute information was filed, charging Mr. Golden with a crime of carnal knowledge in violation of RCW 9.79.020. The matter was set for trial on December 18, 1974, and was continued until January 29, 1975. On January 29, 1975,

Mr. Golden failed to appear for trial and on said date a warrant for his arrest was issued.

Upon locating appellant in Sacramento, the Governor of Washington filed a requisition with the Governor of California, who issued a warrant for appellant's arrest. On March 17, 1976, appellant was arrested pursuant to the warrant, brought before the Municipal Court, and arraigned under California Penal Code §1550.1.

On March 22, 1976, appellant made a motion for bail on the Governor's warrant and on that date said motion was denied.

On April 2, 1976, appellant filed a Petition for a Writ of Habeas Corpus in the Superior Court for the County of Sacramento, said Court issuing an Order to Show Cause on May 11, 1976. The petition alleged that extradition prior to a judicial determination of probable cause to believe the appellant had committed the crime alleged, would be in violation of his Fourth and Fourteenth Amendment rights as construed in *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854. On June 3, 1976, the petition was denied.

On June 16, 1976, appellant filed a Petition for Writ of Habeas Corpus in the Court of Appeal for the Third Appellate District. The petition alleged the right to a probable cause determination, relying upon *Gerstein v. Pugh,* supra, and *Ierardi v. Gunter,* 528 F.2d 929 (1st Cir., 1976), a First Circuit decision which has applied *Gerstein,* supra, to extradition proceedings. The petition further alleged that the hearing under §1550.1 of the California Penal Code fails

to comply with these requirements. On June 24, 1976, said Court issued an Order to Show Cause and on September 30, 1976, a hearing was held on the order. On January 7, 1977, the petition was denied.

The Court noted that under Washington law an information may be filed without a preliminary hearing on the question of guilt, and that the appellant had not had the benefit of a judicial determination of probable cause of the crime of carnal knowledge (Opinion of the Appellate Court, pages ii, iii, footnote 2). The Court concluded, however, that the California Courts are barred by statutory law and constitutional principles from inquiring into the guilt of a crime alleged in another state (Court's Opinion, page vi, citing California Penal Code §1552.3; *In Re Russell,* 12 C.3d 229, 236, 115 C.R. 511). In resolving the conflict between this conclusion and the principles set forth in *Gerstein,* supra, the Court stated that the right of extradition was based upon principles of comity, and was a matter of absolute state right (Court's Opinion, page viii, citing *Appleyard v. Massachusetts,* 203 U.S. 222, 277-278, 51 Lawyer's Edition 161, 163). Therefore, the focus of judicial inquiry is necessarily upon the fugitive status of the accused and not upon the substantive crime. This limited inquiry, the Court concludes, affords adequate protection against an unfounded restraint of liberty resulting from unjustified extradition (Court's Opinion, page ix).

On January 24, 1977, a Petition for Rehearing was filed and on January 27, 1977, said petition was denied.

On February 16, 1977, a Petition for Hearing was filed in the Supreme Court of California, re-asserting the Fourteenth Amendment rights under *Gerstein* and *Ierardi,* and on March 9, 1977, the petition was denied.

THE QUESTION IS SUBSTANTIAL

I

The Uniform Criminal Extradition Act is codified in California under P.C. §1548 through §1556.2. Briefly set forth, the extradition procedure consists of several steps. First, a requisition signed by the Governor of the demanding state is filed with the Governor of the asylum state, P.C. §1548.2. This document must state the name of the person sought, the crime charged, and that the accompanying charging document is authentic, P.C. §1548.2. It must aiso allege that the accused was in the demanding state at the time the crime was committed and that he thereafter fled from the demanding state, P.C. §1548.2.

The requisition is accompanied by a charging document which may be either an indictment, information, or affidavit made before a magistrate, and any arrest warrant issued upon such document, P.C. §1548.2. This document must substantially charge the person demanded with having committed a crime, P.C. §1548.2.

Based upon these documents, a Governor's warrant is then issued and must substantially recite the facts necessary to its validity, P.C. §1549.2. Upon arrest under said warrant, the accused must be brought before a magistrate and informed of the demand, the

crime charged, and of his right to counsel, P.C. §1550.1. If the accused wishes to test the legality of the arrest, the magistrate must fix a reasonable time within which to apply for a Writ of Habeas Corpus. The scope of review in such habeas corpus is limited to the issue of the sufficiency of the papers and the identity of the prisoner as the fugitive from justice. *In re Kimler,* 37 C.2d 568.

Under the law of the State of Washington, a criminal charge must be brought by one of four methods:

a) By a grand jury indictment pursuant to R.C.W. Ch. 10.28;

b) By inquest pursuant to R.C.W. Ch. 3624;

c) By complaint brought before a magistrate;

d) By information based upon a finding of probable cause by the prosecutor under Wash. Const. Art. 1 Sec. 25; R.C.W. 10.37.026.

The choice with respect to the method undertaken is entirely within the discretion of the prosecutor, and even if first brought before a magistrate who determines an absence of probable cause, the prosecutor may file an information upon which the cause may be tried. *State v. Ollison,* 68 Wash. 2d 65, 411 P.2d 419.

Appellant was brought to trial upon information filed by the prosecutor under §10.37.026, said cause resulting in a hung jury. He was thereafter charged with a different offense, carnal knowledge, again upon information filed by the prosecutor. There has not been a judicial determination of probable cause with respect to either of these offenses.

The California extradition statute provides for extradition in the absence of a judicial determination of probable cause, and in rejecting appellant's claim that said statute is in violation of his Fourth and Fourteenth Amendment rights, the Third District Court of Appeal has ruled that *Gerstein* requires only a judicial determination that the accused is the person named in the extradition papers.

The statutory scheme does not provide for bail pending the outcome in the habeas corpus proceeding and there are no California cases on the issue. However, a motion for bail having been made and denied, appellant petitioned for a Writ of Habeas Corpus in the Third District Court of Appeal, alleging the right to bail. The petition was denied.

II

The question of whether the Fourth Amendment requires a judicial determination, prior to extradition, of probable cause to believe the accused has committed the crime alleged in the demanding state is not unknown to American Courts. Long before this Court's decision in *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, there was division of opinion on the issue among State and Federal Courts. In *Kirkland v. Preston,* 385 F.2d 670 (D.C. Cir. 1967), the Court, quoting from *Matter of Strauss,* 197 U.S. 324, 25 S.Ct. 535 (1905), noted that an individual detained under an extradition warrant was in effect charged with the crime at the time of his arrest. 385 F.2d 675. The Court further noted that an apprehension of a fugitive under 18 U.S.C. §3182 (the Federal Act) was

plainly an arrest, 385 F.2d 676, and that the consequences of rendition were far more serious than those of any ordinary arrest, 385 F.2d 676, 677. The Court then noted both the absence of significant burden upon the demanding state and the advancement of the interests of the asylum state (in avoiding the expense of extradition) resulting from the application of the Fourth Amendment to extradition proceedings, 385 F.2d 676, 677. These considerations, the Court concluded, and the decision in *Mapp v. State of Ohio,* 367 U.S. 643 (applying the Fourth Amendment to the states) mandated the conclusion that the Fourth and Fourteenth Amendments require that demanding papers establish probable cause for believing the accused guilty of the offense alleged, 385 F.2d 677.

The United States Court of Appeals for the Third Circuit, in *U.S. ex rel. Grano v. Anderson,* 446 F.2d 272 (1971) has followed the *Kirkland* decision, as have the following state cases: *People v. Artis,* 32 A.D.N.Y. 554, 300 N.Y.S. 208; *Grand v. State* (Del. Super.) 257 A.2d 768 (on statutory grounds); *Clark County v. Thomson,* 452 P.2d 911 (Nev. 1969). On the other hand, other Courts have rejected the rationale of *Kirkland* and have held the Fourth Amendment inapplicable to extradition proceedings. *Garrison v. Taylor,* 329 So.2d. 506 (Miss. 1976); *Bailey v. Cox,* 296 N.E.2d 422 (Ind. 1973).

Then, in 1975, this Court held that the Fourth Amendment requires a judicial determination of probable cause prior to extended restraint of liberty following an arrest, *Gerstein v. Pugh,* 420 U.S. 103, 119, 95 S.Ct. 854, 865. In *Gerstein,* the defendant had been

arrested in the State of Florida upon an information filed by the prosecutor. Under Florida law, as under Washington law, all crimes other than capital crimes could be charged by information, without a preliminary hearing or leave of Court, Fla. Rule Crim. Proc. 3.140(a); *State v. Hernandez,* 217 So.2d 109 (Fla. 1968). Pursuant to that procedure, the defendant had been detained for an extended period of time and denied bail, all in the absence of a judicial determination of probable cause. In holding this procedure unconstitutional, the Court emphasized the drastic consequences of prolonged detention manifested in the loss of income and impairment of family relationships, 420 U.S. 114. However, in going beyond the balancing process, the Court stated that a preliminary determination by a neutral magistrate was an integral part of the common law criminal justice upon which our present system was founded, 420 U.S. 114, thereby intimating that the participation of the magistrate in this regard is deep-rooted in the national conscience, a traditional and inseparable incident of ordered liberty.

The holding in *Gerstein,* by its terms, applies to *any* significant restraint of liberty, 420 U.S. at 125, and appellant has contended that the requirement in *Gerstein* of a judicial determination of probable cause does not depend upon the underlying basis for the arrest. Therefore, appellant contends, even in the absence of consideration of the nature of the deprivation of liberty in the rendition of an individual to another state, the latter falls within the protection of *Gerstein* as soon as he is arrested and detained pursuant to the

Governor's warrant. But the very factors underlying the decision in *Gerstein* apply, *a fortiori,* in the extradition context. Not only is the fugitive exposed to the possibility of loss income and impaired family relationship, he is completely removed from the state and left beyond personal contact with both family and employer.

In recognition of these principles, the United States Court of Appeals for the First Circuit expressly made *Gerstein* applicable to extradition proceedings. *Ierardi v. Gunter,* 528 F.2d 929 (1976). In *Ierardi,* the Court noted the usual extended period of detention pursuant to administrative arrangements in extradition and the separation from family, friends and familiar advisors, 528 F.2d at page 930. The Court then held that extradition warrants are required to comply with Fourth Amendment standards as set forth in *Gerstein,* 528 F.2d at page 930.

The debate over whether the Fourth Amendment applies to extradition proceedings has continued in the wake of *Gerstein.* In *Wellington v. The State of South Dakota,* 413 F.Supp. 151 (1976), the Federal District Court for the Southern District of South Dakota followed *Ierardi* and applied *Gerstein* to extradition proceedings, 413 F.Supp. at 154. On the other hand, the Court in *Garrison v. Smith,* 413 F.Supp. 747, expressly refused to follow *Ierardi,* citing *Gerstein* in support of its decision, 413 F.Supp. at page 755 (following the rationale of *Garrison v. Taylor,* supra, the Miss. Sup. Court decision in the same case).

As can readily be seen, the question is substantial. The obvious potential for a disaster following a prolonged detention is even worse for the individual about to be extradited. For even as strenuous as an ordinary arrest and detention can be on both family and employer relationships, the arrestee is yet geographically in a position to prevent total destruction of either. He may at least pursue personal contact through visitation and continue efforts to raise bail and thereby resume normal contact. On the other hand, the individual who has been extradicted is completely removed, usually far beyond the reach of his family. Even if he is thereafter released upon bail in the demanding state, he is hopelessly separated from his family and unable to return to his place of employment pending trial.

Appellant contends that the infliction of such punishment in the absence of a simple judicial determination of probable cause to believe that the suspect has committed the crime alleged is outrageous, offending as it does traditional notions of fair play and substantial justice. The "stakes" are indeed high, going far beyond those which were the subject of concern in *Gerstein*.

The appellant has asserted his Fourteenth, and though it Fourth Amendment rights as set forth in *Gerstein* and *Ierardi*. California Penal Code §1550.1 provides for a habeas corpus proceeding pursuant to extradition, but the scope of that hearing excludes a judicial determination of probable cause. *In re Golden*, 65 C.A.3d 794. The appellant has asserted the insufficiency of this hearing in every judicial proceeding

available to him under California law and the procedure has been sustained.

The Courts are split on both state and federal levels and the controversy is likely to continue in the aftermath of *Gerstein* and *Ierardi*.

CONCLUSION

The question of whether or not the Fourth Amendment applies to extradition proceedings has been the subject of judicial controversy for years. The cloud upon the conclusion in *Kirkland* that it does, has been removed by this Court's decision in *Gerstein*. California's statutory scheme does not provide for a judicial determination of probable cause prior to the extradition and therefore does not comport with due process.

The potential for devastation in the life of the extradicted illustrates the importance of the issue. Therefore, appellant respectfully requests that this Court provide him the opportunity to present oral argument upon this issue, or in the alternative, reverse the decision of the Court of Appeal.

Dated: May 24, 1977.

ROGER S. HANSON,
JEROME S. STANLEY,
CHRISTOPHER H. WING,
JEROME S. STANLEY, INC.,
Attorneys for Appellant.

(Appendices Follow)

APPENDICES

Appendix "A"

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
State of California
Third Appellate District

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3 Crim. 8778

In re
Otis Edward Golden,
on Habeas Corpus.

[Filed Jan. 7, 1977]

OPINION

Otis Edward Golden petitions for a writ of habeas corpus challenging the validity of proceedings for his rendition to the State of Washington to answer a felony charge. Petitioner contends that there must be a judicial determination of probable cause in the asylum state before a fugitive may lawfully be rendered to the state which his demanded his return. We issued an order to show cause directed to the Sheriff of Sacramento County.

In his return the sheriff alleges that he took custody of petitioner pursuant to an extradition warrant issued by the Governor of California. Annexed to the return is a copy of the warrant together with copies of the demand and supporting papers from the Gover-

nor of Washington. The latter documents disclose that in Spokane County, Washington, petitioner was charged with and tried for the crime of rape; the jury was unable to agree on a verdict and was discharged; a date was then set for retrial; prior thereto an information charging the lesser crime of carnal knowledge was substituted for the original information charging rape; petitioner failed to appear for his second trial and a bench warrant for his arrest issued; petitioner was thereafter arrested in Sacramento County at the request of Washington authorities and proceedings for his extradition to Washington were commenced.

It is not disputed that the demand and supporting papers are in accord with the formal requirements for extradition set forth in Penal Code section 1548.2,[1] or that the Governor's warrant properly issued pursuant to sections 1548.3 and 1549.2. From the demand and supporting papers, however, it does not appear that there has been a judicial determination in the State of Washington of the existence of probable cause to believe petitioner committed the crime of carnal knowledge.[2]

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[1]Unless otherwise noted, all statutory references hereafter are to the Penal Code.

[2]Had not the charge of rape been supplemented by a charge of carnal knowledge, we would be constrained to find otherwise. The rape charge was subject to dismissal at trial for insufficient evidence of guilt (State v. Cordero (1950) 221 P.2d 472) either on motion of the petitioner (State v. Sonneland (1972) 494 P.2d 469) or on the court's own motion (see former RCW § 10.46.090; Wash. Criminal Rules for Superior Court, rule 8.3). From the absence of such dismissal, we deduce an implied finding by the trial judge of probable cause to believe that petitioner committed the crime of rape. However, after the first trial ended with a hung jury, the cause was reset for trial, the rape charge was abandoned and a charge of carnal knowledge substituted. Rape can be committed without committing carnal knowledge, one of the unique elements of which is that the female victim be under the age of 18 years (former RCW §§ 9.79.010 and 9.79.020). Therefore, we cannot assume that the evidence produced in the rape trial would support probable cause as to the charge of carnal knowledge.

Moreover, under Washington law an information may be filed in superior court without a preliminary hearing on the question of guilt (State v. Jefferson (1971) 485 P.2d 77, 78; Wash. Criminal Rules for Superior Court, rule 2.1).

Immediately following his arrest on the Governor's warrant, petitioner was taken before a magistrate as required by section 1550.1. Thereafter petitioner's application for writ of habeas corpus in the superior court, based upon the same ground as urged in the instant petition, was denied. These proceedings were then initiated.

I

Petitioner contends that since extradition proceedings in the asylum state involve a "significant pretrial restraint of liberty" within the meaning of the decision in Gerstein v. Pugh (1975) 420 U. S. 103, 125 [43 L.Ed.2d 54, 72] (see In re Walters (1975) 15 Cal. 3d 738, 749), a judicial determination of probable cause must precede rendition of an interstate fugitive. Respondent concedes that pretrial restraint of a fugitive's liberty is significant, but contends that the issue of whether such restraint necessitates a prior determination of probable cause may not be reached in this

proceeding because petitioner has failed to comply with the procedural requirements of section 1550.1.[3]

Section 1550.1 sets forth the procedure by which a fugitive arrested on a Governor's warrant may test the legality of his arrest in habeas corpus proceedings prior to rendition. Respondent relies on the following language of that section: "If the writ is denied or the accused is remanded to custody, and probable cause appears for an application for a writ of habeas corpus to another court . . . the order denying the writ or remanding the accused shall fix a reasonable time within which the accused may again apply for a writ of habeas corpus."

Respondent contends that the quoted provision was intended to impose a jurisdictional limitation upon a fugitive's right to seek review of the legality of his arrest by filing successive petitions for writs of habeas corpus. In denying petitioner's first application, the superior court neither certified the existence of probable cause nor specified a time within which petitioner could apply for a writ of habeas corpus in a higher court.

[3]Section 1550.1 provides: "No person arrested upon such warrant shall be delivered over to the agent of the executive authority demanding him unless he first is taken forthwith before a magistrate, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel. If the accused or his counsel desires to test the legality of the arrest, the magistrate shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. If the writ is denied or the accused is remanded to custody, and probable cause appears for an application for a writ of habeas corpus to another court, or justice or judge thereof, the order denying the writ or remanding the accused shall fix a reasonable time within which the accused may again apply for a writ of habeas corpus. When an application is made for a writ of habeas corpus as contemplated by this section, a copy of the application shall be served as provided in Section 1475 upon the district attorney of the county in which the accused is in custody, and upon the agent of the demanding state."

The above quoted language in section 1550.1 was added in 1959 (Stats. 1959, ch. 725, p. 2713, § 1). We agree with respondent that it was intended to limit a fugitive's right to contest the legality of his arrest on a Governor's warrant. We do not agree, however, that non-compliance with the procedural requirements of section 1550.1 bars substantive review of the petition filed in the present case. The scope of review in habeas corpus proceedings commenced under section 1550.1 is confined to a determination of the sufficiency of the papers from the demanding state and the identity of the prisoner as the fugitive from justice. (In re Kimler (1951) 37 Cal.2d 568, 571; § 1553.2.) The issue of whether extradition proceedings necessitate judicial inquiry into the existence of probable cause, as raised in the petitions filed both in the superior court and here, is one which is clearly outside the scope of review contemplated by section 1550.1. An analogous situation is created by section 1237.5 which places limitations upon a defendant's right to appeal a conviction resulting from a plea of guilty. Nonetheless, such an appeal is not barred by failure to comply with the requirements of section 1237.5 if it addresses matters other than the validity of the guilty plea. (People v. Ward (1967) 66 Cal.2d 571, 574.) Similarly, the instant petition is not barred by noncompliance with the requirements of section 1550.1 since it addresses a matter wholly outside the contemplation of that statute.

II

We consider the merits of petitioners' contention.

The principal protection afforded a fugitive from justice under the Uniform Criminal Extradition Act (§§ 1548-1556.2) is the right to challenge the legality of his arrest in a habeas corpus proceeding (§ 1550.1; see generally, California Criminal Law Practice II (Cont.Ed.Bar) §§ 27.15-27.17, pp. 723-725). As we have already observed, the scope of review on habeas corpus is limited both by decisional and statutory law and prohibits a judicial determination of probable cause on the issue of guilt. (In re Kimler, supra, 37 Cal.2d at p. 571; In re Katcher (1952) 39 Cal.3d 30, 31; In re Backstron (1950) 98 Cal.App.2d 500, 501; In re Harper (1936) 17 Cal.App.2d 446; § 1553.2.) In fact, California courts presume the existence of sufficient evidence to support an information or indictment issued in a state which has made formal demand for extradition of a fugitive from justice. (In re Russell (1974) 12 Cal.3d 229, 236; In re Cooper (1966) 53 Cal.2d 772, 778.) This presumption is in harmony with the command of Penal Code section 1553.2 prohibiting inquiry into the guilt or innocence of a fugitive in this state against whom extradition proceedings have been brought. Nevertheless, petitioner disputes the vitality of the foregoing authorities, contending that the holding in Gerstein v. Pugh, supra, 420 U. S. 103 [43 L.Ed.2d 54], requires a determination of probable cause in relation to guilt since extradition proceedings necessarily impose a significant restraint on liberty. In *Gerstein,* the federal

Supreme Court held that the Fourth Amendment requires a judicial determination of probable cause either before or promptly after arrest as a prerequisite to extended restraint of liberty. (Pp. 114-125 [43 L.Ed.2d at pp. 65-71].) Thereafter, our Supreme Court, using *Gerstein* as a point of departure, held that a judicial determination of probable cause is required in every case in which a defendant arrested with or without a warrant and charged with misdemeanor is detained awaiting trial. (In re Walters, supra, 15 Cal.3d at p. 747.)

The right to extradition is established by the United States Constitution.[4] "'[E]xtradition is simply one step in securing the arrest and detention of the defendant. And these preliminary proceedings are not completed until the party is brought before the court in which the trial may be had. . . . [c]are must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt.'" In re Russell, supra, 12 Cal.3d at p. 233, quoting from Matter of Strauss (1905) 197 U. S. 324, 332-333 [49 L.Ed. 774, 779].)

Extradition is designed to provide a summary executive process by which states may promptly aid

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[4]"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." (U. S. Const., art. IV, § 2, cl. 2.)

one another is bringing to trial persons accused of crime who have sought asylum against the processes of justice (Biddinger v. Commissioner of Police (1917) 245 U. S. 128, 132 [62 L.Ed. 193, 198]). The constitutional provision for extradition is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the states (Appleyard v. Massachusetts (1906) 203 U. S. 222, 227 [51 L.Ed. 161, 163]). Under this constitutional provision, extradition is not a matter of mere comity, but an absolute right of the demanding state and duty of the asylum state (In re Russell, supra, 12 Cal.3d at p. 234; In re Morgan (1966) 244 Cal.App.2d 903, 910). Thus an asylum state does not refrain from undertaking an examination of a fugitive's guilt merely to avoid procedural delays or complications in the rendition procedure. Rather it does so in recognition of the principle that such an inquiry "into the merits of the charge against the prisoner or into the motives which inspired the prosecution in the demanding State . . . exceeds its authority under the constitutional and statutory provisions regulating the extradition of criminals. The mandate of the constitution requires 'a person *charged* in any State with a crime' to be delivered by the asylum State to the State whose laws he has violated. That State alone can determine the guilt or innocence of the offending party." (Emphasis ours.) (In re Kimler, supra, 37 Cal.2d at p. 752.) The summary nature of the extradition process is not founded upon mere considerations of speed and efficiency in the rendition of fugitives. It is based upon

the federal Constitution and implementing statutes which recognize extradition as something more than a matter of mere comity between cooperating states. (Appleyard v. Massachusetts, supra, 203 U. S. at pp. 277-278 [51 L.Ed. at p. 163]; In re Russell, supra, 12 Cal.3d at p. 234; In re Morgan, supra, 244 Cal.App.2d at p. 910.)

The perfunctory nature of the extradition process as conceived by the Constitution justifies the limited role played by courts of the asylum state in the rendition of interstate fugitives. Since the constitutional and statutory provisions relating to extradition bar inquiry by the asylum state into the merits of the charge against an alleged fugitive, the focus of judicial inquiry in the asylum state is necessary upon the fugitive status of the accused and not upon the substantive crime. This limited inquiry affords adequate protection against an unfounded restraint of liberty resulting from unjustified extradition since proof may be required in the asylum state that a detained individual is indeed a fugitive from justice and that he is substantially charged with a crime against the laws of the demanding state. (In re McBride (1953) 115 Cal. App.2d 538, 541; In re Backstron, supra, 98 Cal.App. 2d at p. 501.) By postponing inquiry into the existence of probable cause until a fugitive is lawfully returned to the demanding state, a necessary accommodation is achieved between an individual's interest in protection against unfounded invasions of liberty and privacy and the state's interest in upholding the constitutional and statutory principles governing extradition.

The order to show cause is discharged and the petition for habeas corpus is denied.

CERTIFIED FOR PUBLICATION

Puglia, P. J.

We concur:

Regan, J.

Evans, J.

Appendix "B"

CALIFORNIA PENAL CODE, AS AMENDED

Penal Code §1549.1:

The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in §1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in the demanding State at the time of the commission of the crime, and has not fled therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other State.

Penal Code §1549.2:

If a demand conforms to the provisions of this chapter, the Governor or agent authorized in writing by the Governor whose authorization has been filed with the Secretary of State shall sign a warrant of arrest, which shall be sealed with the State Seal, and shall be directed to any peace officer or other person whom he may entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of of its issuance.

Penal Code §1549.3:

Such warrant shall authorize the peace officer or other person to whom it is directed:

(a) To arrest the accused at any time and any place where he may be found within the State;

(b) To command the aid of all peace officers or other persons in the execution of the warrant; and

(c) To deliver the accused, subject to the provisions of this chapter, to the duly authorized agent of the demanding State.

Penal Code §1550.1:

No person arrested upon such warrant shall be delivered over to the agent of the executive authority demanding him unless he first is taken forthwith before a magistrate, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel. If the accused or his counsel desires to test the legality of the arrest, the magistrate shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. If the writ is denied or the accused is remanded to custody, and probable cause appears for an application for a writ of habeas corpus to another court, or justice or judge thereof, the order denying the writ or remanding the accused shall fix a reasonable time within which the accused may again apply for a writ of habeas corpus. When an application is made for a writ of habeas corpus as contemplated by this section, a copy of the application shall be served as provided in §1475 upon the District Attorney of the county in which the accused is in custody, and upon the agent of the demanding state.

Appendix "C"

Superior Court of the State of California
in and for the
County of Sacramento

Date June 3, 1976, Court met at 8:30 a.m. Department No. 1, Present Hon. John Sapunor, Judge Douglas Darewell, Deputy Clerk Patricia Hopper, Reporter Gary Brown, Bailiff

48566
The People

vs.

Otis Edward Golden

Counsel:

Victor Saradarian, Deputy DA
Chris Wing
(Underline Counsel Present)

Nature of Proceedings:

Order to Show Cause re:
Petn. for Writ of Habeas Corpus
(Cont. from 5-28-76)

The above entitled cause came on this day with Deputy District Attorney Victor Saradarian and counsel Chris Wing, being present, for and with Defendant in open court.

Whereupon the COURT ordered the petition for Writ of Habeas Corpus DENIED.

The defendant is remanded.

MINUTES

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This minute order was duly entered in R/A and a copy placed in the file.

Attest: J. A. Simpson
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Sacramento

By /s/ J. Clark, Deputy
County Clerk M.O. 4 Action No. 48556

In the Court of Appeal
State of California
Third Appellate District

3 Crim. 8778
Sacramento

In re
Otis Edward Golden,
on Habeas Corpus.

[Filed Jan. 27, 1977]

By the Court:
Petitioner's petition for rehearing is denied.

Dated: January 27, 1977.

Puglia, P. J.

cc: Jerome S. Stanley
Attorney at Law
930 G St., Suite 100
Sacramento, CA.

cc: Gregory W. Baugher
Deputy Attorney General

cc: Reporter of Decisions
4198 State Building
San Francisco, CA.

cc: West Publishing Co.
50 W. Kellogg Blvd.
St. Paul, Minn. 55102

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76–1681

OTIS EDWARD GOLDEN,
Appellant,
v.
THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the California Court of Appeal
Third Appellate District

MOTION TO DISMISS OR AFFIRM

EVELLE J. YOUNGER
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State of California
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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Codes

Other Authorities

In the
Supreme Court of the United States

October Term, 1976

No. 76–1681

OTIS EDWARD GOLDEN,
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v.
THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the California Court of Appeal
Third Appellate District

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee hereby moves to dismiss the appeal, or, in the alternative, to affirm the judgment of the Court of Appeal, Third Appellate District, State of California, on the ground that the question presented is so unsubstantial as not to warrant further argument or consideration.

STATEMENT

This is a direct appeal from the January 7, 1977, ruling of the Court of Appeal, Third Appellate District, State

of California, denying appellant's application for a writ of habeas corpus on the grounds that he is not entitled to be released from custody maintained by the Sacramento County Sheriff pursuant to a Governor's warrant of arrest and rendition issued in favor of the State of Washington.

Appellant is a fugitive from the State of Washington, where he is charged with the crime of carnal knowledge. When appellant failed to appear for trial in that state, a Washington court issued a bench warrant for his arrest. Thereafter, appellant was located in the County of Sacramento, California, and the Governor of Washington submitted a formal demand for his arrest and rendition. On February 18, 1976, Governor Brown of California complied with that demand and issued a warrant. Appellant was arraigned on that warrant on March 17, 1976, and, after indicating that he wished to file a petition for writ of habeas corpus, was remanded to the custody of the sheriff.

Through his attorney, appellant proceeded to file petitions for writs of habeas corpus in the Sacramento County Superior Court and in the Court of Appeal. In both courts, he claimed, as he does now, that this Court's decision in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), mandates a judicial finding of probable cause on the issue of guilt before he can be remanded to Washington pursuant to the Governor's warrant. In denying appellant's petition, the Court of Appeal held that the interstate rendition of fugitives is a summary executive process which is but one step in the arrest of an

individual and that, under the Constitution and statutes, an inquiry into the guilt or innocence of the fugitive by officials of the asylum state is absolutely prohibited. The court noted that the protection against arbitrary arrest and rendition lies in the petition for writ of habeas corpus and the statutory guarantee that every fugitive has a right to pursue such a writ if he desires.

Following the appellate court's ruling appellant sought review in the California Supreme Court, which denied a hearing on March 3, 1977. On March 28, 1977, appellant filed in the Court of Appeal his notice of appeal to this Court pursuant to Title 28, United States Code, section 1257(2).

ARGUMENT

The decision of the California Court of Appeal is clearly correct. Interstate rendition is governed essentially by the federal Constitution and implementing statutes. Article IV, Section 2, Clause 2 of the Constitution provides:

> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Congress has implemented that provision in what is now Title 18, United States Code, section 3182:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State,

District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

This Court has made it abundantly clear that interstate "extradition" involves a "summary executive proceeding" in which the judiciary plays a very limited role. In *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917), the court noted that habeas corpus is the means for judicial review of a rendition proceeding and said:

"This much, however, the decisions of this court make clear; that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed; and,

frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding State."

This Court has repeatedly said that when the Governor issues his warrant, custody under the authority of that warrant is presumed valid and justified, unless and until overcome by convincing evidence presented by the alleged fugitive. E.g., *South Carolina* v. *Bailey*, 289 U.S. 412, 422 (1932); *Marbles* v. *Creecy*, 215 U.S. 63, 68 (1909); *Illinois ex rel. McNichols* v. *Pease*, 207 U.S. 100, 109 (1907); *Muncey* v. *Clough*, 196 U.S. 364, 375 (1904).

Clearly, the federal Constitution and statutes do not authorize the States to inquire into the guilt or innocence of a fugitive and, just as clearly, the decisions of this Court expressly preclude such an inquiry. Appellant seeks to circumvent these well established precedents, based upon legitimate governmental interests of comity in transactions between states and of efficiency in bringing interstate fugitives to justice, by arguing that this Court's decision in *Gerstein* v. *Pugh*, *supra*, impliedly overruled this line of authority.

Gerstein v. *Pugh* is distinguishable for several reasons. First, it did not involve interstate rendition. It involved a situation where a Florida prosecutor filed an information charging a defendant with various offenses. A warrant was issued and an arrest made. Bail was denied and, under Florida law, there was no right to a preliminary examination or other judicial review for at least thirty days. The court held that "the Fourth Amendment requires a judicial determination of

probable cause as a prerequisite to *extended restraint* of liberty *following arrest.*" (Emphasis added.) *Gerstein* v. *Pugh, supra*, 420 U.S. at 114.

Other than the fact that *Gerstein* did not involve interstate rendition, there are at least two other substantial reasons why *Gerstein* does not apply to rendition proceedings in an asylum state. First, *Gerstein* does not require a judicial probable cause determination until after arrest. As this Court correctly noted in *Matter of Straus*, 197 U.S. 324, 332–333 (1905), extradition is only a preliminary step in the arrest of an individual. The preliminary process is not completed until the defendant is actually returned to the demanding state and is brought before the court having jurisdiction to try the offense.

Second, prolonged detention under a Governor's rendition warrant is neither contemplated, necessary or desirable. As already noted, interstate rendition is intended to be a summary executive process involving the prompt arrest and delivery of fugitives from justice. Unlike the defendant described in *Gerstein*, a fugitive has a statutory right to seek immediate judicial review of the Governor's decision that he should be extradited to another state, but the focus of such an inquiry is upon the fugitive status of the accused and the sufficiency of the papers. It is not upon the substantive crime. The determination of the validity of the substantive charge is for the courts of the demanding state, for it is only those courts which are competent to interpret and apply the laws of that state. Within the context of interstate

extradition, it is clear that the right of a fugitive to seek judicial review in habeas corpus proceedings is an adequate protection against arbitrary arrest and rendition.[1] For these reasons, it is apparent that neither the rationale of *Gerstein*, nor the case itself, presents a reason for overturning well established authority.

Although the cases of *Kirkland* v. *Preston*, 385 F.2d 670 (D.C. Cir. 1967) and *Ierardi* v. *Gunter*, 528 F.2d 929 (1st Cir. 1976) would appear to sanction an inquiry into guilt by the asylum state, the number of jurisdictions which adopt the same view is small. While appellee submits that those jurisdictions have misinterpreted the relationship between the Fourth Amendment and the extradition clause of the Constitution, the conflict is of minor significance and does not require resolution by this Court.

For the foregoing reasons, appellee submits that the California courts have properly applied well established constitutional provisions and case law and that the question raised by the appellant is not substantial. It is therefore requested that this Court affirm the decision

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[1] It must be remembered that a Governor has no authority to order the arrest and rendition of a fugitive unless he is presented with a legally sufficient demand for extradition. *Compton* v. *Alabama*, 214 U.S. 1, 6 (1908). Before the Governor can issue a warrant, he must determine that the wanted individual is a fugitive from justice, that he is substantially charged with a crime in the demanding state, and that the papers are in proper form. *Illinois ex rel. McNichols* v. *Pease, supra*, 207 U.S. at 108–109. Thus, habeas corpus review is not the fugitive's only protection against arbitrary arrest and rendition; the Governor of the state in which he is found must, in every case, determine that arrest and rendition is proper before he can issue the warrant.

or dismiss the appeal.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

JACK R. WINKLER
Chief Assistant Attorney General
Criminal Division

ARNOLD O. OVEROYE
Assistant Attorney General

CHARLES P. JUST
Deputy Attorney General

GREGORY W. BAUGHER
Deputy Attorney General

Attorneys for Appellee

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